SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

## No. 894

JAMES H. FRIEND, SILAS TROWELL and FLOYD LONG,

*Petitioners*

versus

TROPIS COMPANY, LTD.

*Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

SIDNEY H. KELSEY,
KELSEY AND RABINOWITZ
1408 Maritime Tower
Monticello at City Hall Ave.
Norfolk, Virginia 23510
*Counsel for Petitioners*

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Friend, Trowell and Long pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 11,230, Friend et als v. Tropis Company, Ltd., entered therein on September 11, 1967. This Judgment affirmed a Final Judgment of the United States District Court for the Eastern District of Virginia at Norfolk, adverse to the Petitioners.

## I. OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 382 F2d 633. This Opinion is copied in the Appendix to this Petition, pp. 1a through 7a.

## II. JURISDICTION

The Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## III. QUESTIONS PRESENTED

1. Where petitioners longshoremen were in vessel's hold trimming cargo and sustained electrical shocks and resulting injuries, was the vessel unseaworthy because neither it nor its cargo were reasonably intended to cause electrical shocks, or were the longshoremen required to show by a preponderance of the evidence (1) the type and kind of electrical shock and (2) from what source or cause the electrical shocks came from, as a prerequisite condition precedent to rendering vessel unseaworthy?

2. If the injuries were caused by "static" electricity, as claimed by the shipowner, were the longshoremen denied their Seventh Amendment jury trial as to unseaworthiness, when the District Court removed this from jury consideration by charging the jury that no recovery could be rendered for "static" electricity causing injuries?

## IV. STATEMENT

Petitioners longshoremen Friend, Trowell and Long, while working in the bottom hold of No. 2 hatch of the Greek steamship AVRA, at Norfolk, Virginia, sustained

electrical shocks and resulting injuries while trimming the potash cargo of the vessel. They filed this diversity action against the shipowner respondent Tropis Company, Ltd., on the grounds of negligence and unseaworthiness of the vessel. On the completion of the opening statement of shipowner's counsel that the longshoremen had indeed sustained electrical shocks, classified as "static" electricity, plaintiffs' counsel moved for a directed verdict on the grounds that shipowner's counsel had admitted liability as to unseaworthiness.

Notwithstanding, the Court denied the Motion. Testimony was then presented showing that the longshoremen had, while trimming potash cargo in the No. 2 hold of the vessel, sustained electrical shocks. Two of the men were taken to the hospital and all three of the men received medical care for various lengths of time. Upon the completion of all of the evidence, petitioners again moved for directed verdict on the grounds of unseaworthiness, which was denied by the Court and the case was submitted to the jury. The Court charged the jury that there was no dispute concerning the plaintiffs' sustaining electrical shocks nor evidence to the contrary (App. 7a).

However, the Court charged that there was no liability on the ship if the longshoremen's electricial shocks and resulting injuries were caused by "static" electricity and the vessel would only be liable if they showed that the electrical shocks were caused by bad wiring or bad electrical system of the ship. Counsel for the longshoremen objected and excepted to the Court's charge on the grounds that the vessel was unseaworthy as a matter of law since its hold and cargo was not reasonably intended to be charged with electricity, whether "static" or from

some other source or type or kind of electricity. Petitioners sought to show that the electrical shocks were due to bad, exposed and broken electrical wires in No. 2 hatch where the men were working, causing stray electrical currents in the steel stanchions and parts of the hold. The shipowner contended that the electrical shocks and resulting injuries to petitioners were due to "static" electricity in working the cargo.

The testimony revealed that on November 1, 1963, the three longshoremen started work in No. 2 hold of the vessel trimming the potash cargo at 8:00 in the morning and they continuously worked all that morning until the lunch period at 12:00 p.m., without incident. There were no electrical shocks of any kind emanating from either the ship or the cargo. At 1:00 p.m., the men went back to work in the No. 2 hold, trimming the potash cargo. When the potash started sliding in the hold, Trowell grabbed a stanchion in the vessel and received an electrical shock and, "I didn't know anything for a second, two or three seconds." Longshoreman Long stated, " . . . and I was close up to the wing and was shoveling down. I was slipping down, and I grabbed on to this beam of the ship. This is where I got shocked there." Longshoreman Friend stated that at about the same time he had grabbed hold of a beam and sustained an electrical shock. Work was thereafter immediately stopped, the men were taken out of the hold and the hatch was not worked the rest of the day. The ship's electrician came down and grounded the ladder so the men could get out of the vessel. Friend stated that he had seen the electrical wires in the bulkhead and they had been battered and bent up and exposed and looked as if they had been spliced. The bent and mashed wires were also reported by the shipowner's surveyors who came aboard the ship after the incident to

ascertain the cause of the electrical shocks, although it was denied that these broken wires were the cause of the stray electrical currents in the hold. It was undisputed that neither electrical shocks nor "static" electricity had ever been known to occur in working potash cargo and indeed these electrical shocks had not occurred while working the same cargo during the morning period 8:00 a.m. to 12:00 p.m. on the day petitioners were injured at approximately 1:30 p.m. Two of petitioners were hospitalized for electrical shock and all three were under medical care for various periods of time.

The completion of discharge of potash cargo from No. 2 hold of the vessel was not made until November 6, five days after the men had been shocked. On November 5, 1963, four days after this incident, the shipowner had its surveyors aboard the vessel to determine the cause of the electrical currents. The circuits on the panel board between No. 1 and No. 2 cargo holds were checked and three were found very poorly insulated. These experts claimed that the men had sustained "static" electrical charges which in some mysterious way built up in their bodies and suddenly decided to become discharged in the lower hold of No. 2 hatch of the steamship AVRA, causing these longshoremen to be injured. There was never any dispute that the men had sustained electrical shocks. The only dispute in the evidence was whether it was "static" electricity or some other kind or whether the electrical charges emanated from the ship's bad wiring system. The shipowner's expert conceded that "static" electrical charges resemble lightning in some respects and are highly dangerous (App. 10a). Whatever the kind of electrical current, without conflict, all evidence showed the longshoremen were injured from electrical shock, requiring medical attention.

The District Court removed the shipowner's factual contention, as a ground for the longshoremen's recovery from the jury by charging them that the longshoremen could not recover unless they proved the source of the electrical charges as being the bad wiring. The jury rendered a verdict against them and in favor of the shipowner.

Following the reasoning of the District Court, the Court of Appeals affirmed, stating "as electricity indubitably was the cause of their injuries, the next question was its source" (App. 2a), fully approving the District Court's holding that if the electrical shock was caused by static electricity, there was no liability for unseaworthiness. The District Court's denial of the longshoremen's Motion for Directed Verdict was proper, so holds the Court of Appeals, since it would have foreclosed the ship's defense "on the issue of responsibility for the static electricity" (App. 4a). While approving of the District Court's withdrawal of the static electricity issue from the jury as grounds for unseaworthiness, yet later in its Opinion the Court of Appeals stated that "the plaintiffs were not precluded from relying on this evidence" (App. 5a). While holding that the electrical charges which injured the longshoremen were beyond the control of the shipowner, the Court of Appeals absolves the shipowner of any responsibility therein because the unseaworthiness was created by factors beyond the shipowner's control and because the longshoremen had failed to show that the electrical charges were caused either by bad wiring or static electricity to allow a recovery for unseaworthiness.

## V. REASONS FOR GRANTING THE WRIT

There is a clear and direct conflict in principle between the decision of the Court of Appeals in this action and the decisions of this Court in *Mitchell* v. *Trawler-Racer,* 362 U. S. 539, and *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396. In Mitchell the seaman was injured when he stepped on the ship's rail covered with slime and fish gurry apparently remaining there from the earlier unloading operations. Both the District Court and the Court of Appeals had held that the seaman must prove knowledge of this condition and an opportunity to remedy it before he could recover for this transitory unseaworthy condition, and the question presented to this Court was whether or not the liability of the shipowner for transitory unseaworthiness was limited by concepts of common law negligence as to knowledge and due care.

This Court stated, 362 U. S. 548, 549:

> In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 90 L.ed. 1099, 66 S.Ct. 872, the Court effectively scotched any doubts that might have lingered after Mahnich as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is "absolute." "It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." 328 U. S., at 94, 95. The dissenting opinion agreed as to the nature of the shipowner's duty . . . "(D)ue dili-

gence of the owner," it said, "does not relieve him from this obligation." 328 U. S. at 104.

The decision of the Court of Appeals here dilutes the warranty of seaworthiness with the prerequisite condition of showing common-law negligence and places the heavy burden on the petitioners to show the source of the electrical shocks plus fault of the shipowner. In so deciding, this decision clearly conflicts with the principles laid down by this Court in the Mitchell case. Further the Court below in approving the District Court's charge to the jury that static electricity could not in law render the vessel unseaworthy, vaguely concludes that the District Court "may have intended merely to withdraw the issue from the jury for inadequate evidence" (App. 4a). Overlooked completely are the undisputed facts that two of the petitioners were hospitalized and all three required medical treatment for injuries diagnosed by the doctors as being caused by electrical shocks. This evidence in itself was inference enough that the injuries were caused by electricity, whether "static" electricity, as contended by the shipowner, or electricity caused by bad wiring. Obviously neither the hold of the vessel nor its cargo while charged with electricity of any kind is reasonably fit for its intended use nor a safe place in which petitioners could work. Where the evidence is undisputed as to the unsafe or unseaworthy condition, it follows that unseaworthiness from such evidence is a conclusion of law and reviewable as such. *Sprague* v. *Texas Co.*, 250 F2d 123, 124 (2d Cir. 1957); *Van Carpels* v. *AMERICAN HARVESTER*, 297 F2d 9, 12 (3d Cir. 1961); *Mills* v. *Mitsubishi Shipping Co.*, 358, F2d 609 (5th Cir. 1966); *Thorson* v. *Inland Navigation Co.*, 270 F2d 432 (9th Cir. 1959); *Crescent Wharf & Warehouse* v. *Compania*, etc., 336 F2d 714 (9th Cir. 1966); *Amador*

v. *A/S J. Ludwig Mowinckels Rederi*, 224 F2d 437 (2d Cir. 1955).

The Court of Appeals here concludes that static electricity, for which the District Judge charged the jury there was no liability, did not make the vessel unseaworthy even though in the regular course of work these longshoremen sustained injuries from electrical shocks never intended to be present in either the hold or the cargo. We do not think reasonable safety can be equated with risks of electrical shocks. We think the longshoremen sustained their burden of proof when they showed they sustained electrical shocks and resulting injuries, all of which was never reasonably intended to occur as a part of their work in the ship's hold. Therefore this decision imports negligence concepts into the warranty of seaworthiness, which has been prohibited by this Court.

The Court of Appeals further holds that the District Court was right in denying the longshoremen's Motion for Directed Verdict in charging that there was no responsibility if the shocks were caused by the static electricity, saying that otherwise, it would have foreclosed the ship's defense on the issue of responsibility for the static electricity (App. 4a). This holding conflicts in principle with the holding of this Court in *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, affirming *Petterson* v. *Alaska S.S. Co.*, 205 F2d 478 (1953), holding that the shipowner could not evade its responsibility for unseaworthiness by showing that it had no control or direction over the causes of the unseaworthiness. See also *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 100.

Illustrating the conflict of the Court of Appeals' decision here with the foregoing decisions of this Court, is the correct decision of the Second Circuit in *Van Car-*

*pals* v. *The S. S. AMERICAN HARVESTER*, 297 F2d 9, (1961), where steam and hot water gushed forth from the valve, burning a shore repairman. No one could explain what caused the steam to cause the bonnet of the pipe to come off, since the shipowner proved that there was no undue pressure on the line. The trial judge even stated, "This appears to be the type of unexplained accident for which liability cannot be predicated on negligence," and since the shipowner's evidence showed an absence of pressure, he held the vessel was not unseaworthy. The Second Circuit reversed, and Judge Clark stated as follows, regarding the unseaworthiness of the vessel:

> We disagree and hold that under prevailing law the vessel must be held unseaworthy. Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the valve was actually not in a safe condition for the work needed to be done upon it. The trial court believed that the independent tests made to double check the gauges and the fact that libelant saw no signs of pressure negated an unseaworthy condition. But we do not think that follows. The accident occurred; there was steam in the valve; and it erupted. These conceded physical facts imperatively required a finding of unfitness for the task in hand. Thus a conclusion of unseaworthiness should have been reached irrespective of the proofs tending to absolve the owner of negligence.

Thus the situation falls within the "absolute" duty of the shipowner to furnish a seaworthy ship which "is essentially a species of liability without fault, analogous to other well-known instances in our law." *Seas Shipping Co.* v. *Sieracki*, 328

U. S. 85, 94, 66 S. Ct. 872, 90 L.Ed. 1099, quoted in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549, 80 S. Ct. 926, 932, 4 L.Ed. 2d 941, which has now settled the law we must apply. The Mitchell case points out that since Seiracki the Court's decisions "have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care"; that it applies equally to a condition arising after the vessel leaves her home port as before, or to one which may be only temporary; that it applies to defective equipment temporarily brought on board by an independent contractor over which the owner had no control; and that the latter's actual or constructive knowledge is not essential to his liability. "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history." 362 U. S. 539, 549, 550, 80 S.Ct. 933. See also *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 81 S.Ct. 6, 5 L.Ed. 2d 20, and our own decision in *Sprague* v. *The Texas Co.*, 2 Cir., 250 F2d 123.

It thus appears clear to us that the shipowner cannot wipe out this "absolute" duty by saying that he does not know what caused the particular accident or suggesting in effect that it was an act of God.

297 F2d 11.

Finally, the Court of Appeals here approved of the District Court's action in removing from jury consideration, the shipowner's evidence as to static electricity caus-

ing the injuries as a ground for unseaworthiness, by telling the jury that no recovery could be given the longshoremen on this ground. The District Court's charge had the effect of therefore removing from jury consideration part of the evidence which they had a right to consider. We feel that this action as approved by the Court of Appeals denied the longshoremen their jury trial of all of the issues if it could be considered that there was any dispute as to unseaworthiness. But yet again this brings us back to placing the burden on these longshoremen of proving negligent fault and cause of an unseaworthy condition which this Court has declined to place upon them.

## VI. SUMMARY AND CONCLUSION

We think that the decision of the Fourth Circuit Court of Appeals in petitioners' case is in clear, direct and substantial conflict in principle with the decisions of this Court in *Mitchell* v. *Trawler Racer, Inc.* 362 U. S. 539, and *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396, making it of utmost importance that this Court review the decision of the Court of Appeals in petitioners' case, since this decision tends to create uncertainty as to the rights of all similar litigants. Additionally, the decision is plainly wrong and a mistake has been made.

Under the circumstances of this case and in view of the clear conflict, summary action by this Court would be appropriate and all that is required to remedy the conflict and correct the mistake. *Mascuilli* v. *U.S.*, ___ U.S. ___, 18 L.Ed. 2d. 743 (No. 274, May 22, 1967); *Albanese* v. *N. V. Nederl,* etc., 382, U. S. 283 (1965).

Wherefore petitioners respectfully pray that this petition be granted and that a Writ of Certiorari issue,

and that this Honorable Court review the decision of the Court of Appeals and that it may be reversed, entering judgment as a matter of law for the petitioners on the grounds of unseaworthiness, with remand for jury trial as to damages only.

SIDNEY H. KELSEY
*Attorney for Petitioners*
*Friend, Trowell and Long*

SIDNEY H. KELSEY,
KELSEY AND RABINOWITZ
1408 Maritime Tower
Monticello at City Hall Ave.
Norfolk, Virginia 23510

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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JAMES H. FRIEND, SILAS TROWELL and FLOYD LONG,
Appellants,

*versus*

TROPIS COMPANY, LTD.,
Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

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(Argued June 23, 1967. Decided September 11, 1967.)

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Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

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Sidney H. Kelsey (Kelsey & Rabinowitz on brief) for Appellants and John W. Winston (Seawell, McCoy, Winston & Dalton on brief) for Appellee.

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ALBERT V. BRYAN, Circuit Judge:

For personal injuries suffered by them while working in the hold of the Greek freighter, SS AVRA, discharging cargo at Norfolk, Virginia, longshoremen Trowell, Friend and Long brought this action at law for damages against her owner, Tropis Company, Ltd. On

both assertions of liability—negligence and unseaworthiness of the vessel—the jury found for the defendant. From the judgment of the District Court entered on this verdict, the plaintiffs appeal: (1) for the refusal of the Court to direct a finding of liability for unseaworthiness, and (2) for misdirection upon this alleged liability. The motion was correctly overruled, and we conclude, too, there was no reversible error in the instruction.

The injuries, concededly, resulted from electric shocks suffered while these men were trimming a cargo of bulk potash for unloading. "Grabs"—clam shell buckets on a hoist—were let down into the hold through the hatchway for removal of the lading. As they "grabbed" it, the longshoremen would fill the hole dug by the grabs so that they could pick up a full load on return. The potash ran like sand, and the workers slid with it towards the excavation. To stay their slide they would reach for a stanchion or beam. On the occasion in suit, just as they were about to touch a metal piece of this kind, the longshoremen felt an electric shock and were hurt.

As electricity indubitably was the cause of their injuries, the next question was its source. Plaintiffs blamed it on defective wiring. In denial, the defendant ascribed it to static electricity generated on the bodies and clothes of the claimants by friction with the potash. That such activity could create a charge was demonstrated in producing an electric arc by holding a metal shovel scoop a fraction from an inch from the stanchion or beam just after passing it through the potash. No further arcing could be obtained until the shovel again had been put in abrasive contact with the potash and held near the metal strut. A small shock was felt when one walking over the cargo touched the steel ladder leading to the

deck above. Expert testimony declared this phenomenon accountable for the electricity in the hold. At the same time, qualified witnesses gave evidence to the safety and good order of the electric system aboard ship.

The accident occurred in Number 2 hold about 2 o'clock in the afternoon of November 1, 1963. Having worked the hold continuously since 8 o'clock that morning without mishap, plaintiffs turned to again at 1 p.m. after a lunch break. An hour later they sustained the shocks. Work in that hold was immediately suspended, with off-loading of similar cargo shifted to another hold without event or mishap. In the morning the temperature at 8 o'clock had been 55 degrees and the relative humidity 57 per cent. From then on the temperature increased and the humidity declined until 2 p.m. the Weather Bureau reading showed 71 degrees and 36 per cent.

It was authentically testified that relative humidity within the range of 30 to 40 per cent will foster the accumulation of electric charges. Damp air, it is said, harmlessly conducts the charge off to ground it as it is formed; dry air is an insulator, favoring the accretion of substantial charges. No such static electricity, according to the testimony, had ever been encountered in a ship's hold at or near Norfolk in the memory of watermen witnesses, a retrospect of some 25 years. Furthermore, we are told without contradiction that no practical means to prevent the creation of static in the circumstances is known.

Notwithstanding, the plaintiffs urge, electricity free in the hold rendered the ship unseaworthy, denying the longshoremen a safe place in which to work as assured by the doctrine of unseaworthiness. Their argument is that the cause of the presence of this injurious element is

immaterial—that the defendant is responsible for the electricity in the hold whether it escaped through defective wiring or was generated from the men's friction with the cargo. On this reasoning the plaintiffs moved for a peremptory instruction to the jury to find unseaworthiness. Refusing the requested direction, the Court charged that the defendant was liable if the electricity came from defective wiring, but that there was no responsibility "if the shock was caused solely by static electricity."

Denial of the motion was altogether proper; it would have foreclosed the ship's defense on the issue of responsibility for the static electricity. The instruction, true, evinced the idea that static electricity does not in law render a vessel unseaworthy; this could possibly be too broad an immunization of the ship. However, the Court may have intended merely to withdraw the issue from the jury for inadequate evidence. In any event, we think it should have been taken away for the latter reason, and the withdrawal for any other reason was not hurtful to the plaintiffs.

Proof that electricity was at large in the hold established unseaworthiness prima facia and, without more, warranted the jury to make that finding. But the defendant was entitled to contest the plaintiffs' showing, as it did. Thereafter the issue became a question to be resolved by the jury on the evidence and under instructions defining unseaworthiness. According as the jury found there was or was not a wiring defect releasing the electricity, of course liability would or would not be imputable to the defendant on that score. But static electricity could not be excluded as nonactionable as a matter of law. The jury would have been allowed to speak on liability

based upon static electricity if there had been evidence enough to allow it to ponder the question.

As the present verdict was for the defendant, the jury obviously found no casual defect in the electric system. While the court's charge was phrased as an unqualified holding that static electricity could not be a predicate of recovery, it was also, in effect, a declaration to the jury that the evidence would not justify a verdict on that basis. Therefore, we are not required to say whether static electricity on a ship does or does not constitute unseaworthiness. Hence we turn at once to evaluate the proof instantly offered to establish an unseaworthiness resulting from static electricity.

To begin with, the plaintiffs adduced no evidence whatsoever to prove the loose electricity the product of a static charge. Indeed, the argument of the plaintiffs in the trial court, as well as on appeal, blamed a defect in the ship's wiring for introduction of electricity in the hold. Static electricity came into the case through the defendant's explanation of the entry of this foreign factor. However, the plaintiffs were not precluded from relying on this evidence, and we thus come to the inquiry whether this electricity breached the ship's warranty of seaworthiness to the longshoremen. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946).

The warranty, as pertinent here, was that the ship was reasonably fit to permit the plaintiffs to perform with reasonable safety the tasks assigned to them. Reasonable care to keep the ship in a reasonably fit condition is not enough, although it would require a charge of negligence. Seaworthiness demands reasonable safety unconditionally. But "the owner is (not) obligated to furnish an accident-

free ship . . . The standard is not perfection, but reasonable fitness . . . a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960).

In measuring the present case by these standards, it is clear that the static electricity did not, on the proof, make the AVRA unseaworthy. The electric charge no more emanated from the ship, her gear or equipment than from the men themselves. The causative factor here was the entry into the hold of relatively drier air with its insulating properties. The potential for harm arose not because electricity was generated but because the air would not bleed if off to ground. This was a natural condition of the natural atmosphere. The happening of the injurious discharge, when the men touched a willing conductor, was no more controllable by the ship than was a stroke of lightning, and just as unforeseeable.

Apposite here are the decision and following words of the Court in *Morales* v. *City of Galveston*, 370 U. S. 165 (1962):

> "The trial court found, upon substantial evidence, that what happened was an unexpected, isolated occurrence . . . " (p. 169.)
>
> * * * * *
>
> "What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without . . . " (p. 171.)

There the claimants "were injured by fumes from the chemical, made noxious by concentration in the closely

confined area (the hold) where they were working" as trimmers of a cargo of grain. The owner was acquitted of the indictment of unseaworthiness. For like reasons we see no liability upon the owner in the case at bar.

*Affirmed.*

* * * * *

## EXCERPTS FROM THE DISTRICT COURT'S CHARGE, Approved by the Court of Appeals

(Tr. 185, 186, 187)

THE COURT:

Ladies and gentlemen, it now becomes my duty to charge you as to the law of the case after which it will be your duty to retire to your room, determine from the evidence the facts in the case, and apply to those facts the law as explained in this charge and render a true and just verdict.

At the outset let me restate to you very briefly the contentions of the parties, the issues in the case, because the law that I am going to explain to you a little later is concerned with these issues. It is not law in the abstract. It is law as it applies to this case.

The plaintiffs contend that they were shocked. There is no dispute about that. There is no evidence to the contrary. The plaintiffs were shocked. The plaintiffs contend that they were shocked by the electrical system of the ship. They point to the fact that the mate testified that at the time of the accident there were no cables jumped wih rubber jumpers, and they point to the fact that at the time the experts came five days later

that there was a jumper on the cables that ran through the number two hatch 'tween deck.

They contend it was the electrical system that caused the shock and that in thirty-four odd years of longshoremen or stevedoring there has never been known to have been a condition of static electricity causing shock unloading potash, and as a result of the shocks there the plaintiffs were injured.

Now, the defendants on the other hand, contend, or the defendant on its part contends that the shock was not caused by the electrical system. The defendant points to the very unusually low atmospheric relative humidity conditions that existed on the afternoon of November 1st, that static electricity was caused because the fertilizer was extremely dry, and that immediately after the men complained on the shock Johnson was able to demonstrate an arc when he pushed the shovel into the fertilizer and brought it near the stanchion and couldn't demonstrate the arc until he again pushed the shovel through the fertilizer.

Now, that is the defendant's contention and, of course, I have summarized them very briefly and in summarizing them I am not intimating in any way which contention is correct. That is for the jury to determine.

I am going to charge you about the law with respect to each contention. In the first place if the shock that the men received was caused in whole or in part by the wiring or the electrical system of the ship, the defendant is liable.

In the second place if the shock was caused solely by static electricity and was not caused by the wiring system of the ship, the defendants are not liable.

In the third place there is no contributory negligence on the part of the plaintiffs. They cannot be denied a recovery for anything that they did.

In the next place the plaintiffs did not assume the risk of being shocked while working in this hold so contributory negligence and assumption of risk are no defense.

Actually it boils down to a factual determination by this jury. If the jury believe from a preponderance of the evidence that the men were shocked by reason of the electrical system, then the defendant is liable. If you believe that static electricity caused this shocking episode, then the defendant is not liable.

* * * * *

(Tr. 193, 194)

MR. KELSEY: (LONGSHOREMEN PETITIONERS' ATTORNEY)

My objections, if Your Honor please, are the Court should not have instructed the jury that if they find that the plaintiffs were injured by reason of static electricity then the defendant is not liable. And the reason for this is it is our position that if they were injured by electricity of any kind aboard the vessel that the vessel was unseaworthy as a matter of law since it was not originally intended to have its hold charged with electricity.

* * * * *

(Tr. 194)

THE COURT:

Now, let the record show that at the conclusion of the entire case Mr. Kelsey moved for judgment for the plaintiffs on the ground that the ship was unseaworthy as a matter of law and the Court overruled that motion.

* * * * *

## SHIPOWNER'S EXPERT CHANDLER

(Tr. 127)

Q You say that static, these men were shocked by static electrical charges, is that correct?

A Yes, sir.

Q Which you say resembles lightning in some respects, I believe? I believe lightning is —

A Discharge of static —

Q Of course, lightning is dangerous, too, is it not?

A Yes, sir.

Q And discharge of static electricity can be dangerous, can it not?

A In an explosive atmosphere it is very dangerous.

Q Very dangerous.

* * * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

## No. 894

JAMES H. FRIEND, SILAS TROWELL and FLOYD LONG,
*Petitioners,*

vs.

TROPIS COMPANY, LTD.,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF FOR RESPONDENT IN OPPOSITION**

JOHN W. WINSTON
SEAWELL, McCOY, WINSTON & DALTON
*Counsel for Respondent*
936 Wainwright Building
Norfolk, Virginia 23510

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## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINION BELOW

The District Court entered judgment on a jury verdict in favor of respondent. The opinion of the Court of Appeals for the Fourth Circuit (Appendix of Petition) is reported at 382 F. (2d) 633.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

### QUESTION PRESENTED

Whether the unexpected accumulation of a static electrical charge upon the persons of petitioners brought

about by changing atmospheric conditions well beyond any control by respondent and not preventable by it made the vessel on which petitioners worked unseaworthy and respondent thus liable for any injury caused petitioners by the subsequent running off of that charge from their persons.

## STATEMENT

Petitioners filed their action for damages against respondent, claiming injury from electrical shock allegedly received while discharging cargo from the hold of respondent's vessel. Both in the District Court and in the Court of Appeals they contended that the electric shock originated in bad wiring on the vessel which caused it to be unseaworthy.

Respondent denied this contention that bad wiring caused the shock. It sought to establish that a static charge had built up upon petitioners' persons and that this charge was discharged therefrom when they touched any metallic portion of the vessel which acted as a ground. This, respondent contended, came about from changing atmospheric conditions which it could not control or even anticipate, and could not be prevented from occurring.

The trial jury chose to reject petitioners' theory that bad wiring caused the shock to occur and accepted respondent's evidence that a static electrical discharge from petitioners' persons was the origin of their complaints.

Petitioners contend that even the presence of the unanticipated and unavoidable static charge upon their persons made the vessel unseaworthy and respondent liable. Both the District Court and the Circuit Court of Appeals disagreed.

On November 1, 1963, petitioners were helping remove a bulk cargo of potash from respondent's vessel. The potash (used in fertilizer) was an inert substance, loose, dry and free-running. It was shoveled toward the middle of the cargo space by petitioners. From 8:00 A.M. until 2:00 P.M. the work proceeded uneventfully. Shortly thereafter petitioners each related sliding through the potash, then stopping their slide by catching hold of a metal stanchion or beam. Each claimed a single electric shock upon touching the metal. Work was suspended as a precaution. No source of the charge could be found until it was demonstrated that a sparking could be created by running a shovel into the cargo, then placing it close to a metallic part of the vessel. The sparking could not be repeated until the shovel was run again through the cargo.

Contrary to petitioners' contention, it was not necessary for anyone to ground the ship's ladder when they left the hold and the evidence of this fact was accepted by the jury.

No further incident occurred when the potash discharge was resumed later.

To identify the source of petitioners' complaints, experts made an inspection on board. They not only ruled out bad wiring as the cause of the shocks, but agreed that static electricity which had built up upon the persons of petitioners and then was discharged on contact with the metallic structure of the vessel was responsible. This accumulation of a static charge, they concluded, came about from a change in the weather conditions existing in the geographical area where the vessel was located, and could not be prevented from occurring.

A brief summary of the uncontradicted factual (and expert) evidence is appropriate:

(1) No lights were burning and no electrical current was being used in the forward part of the vessel at the time petitioners relate being shocked.

(2) Each petitioner slid with the cargo, then caught a metallic stanchion or beam of the ship to stop his slide, and relates receiving a single shock as he touched the metal.

(3) The humidity reading of 57 per cent at 8:00 A.M. had dropped to a reading of 36 per cent at 2:00 P.M. This latter reading was described as an unusually low relative humidity.

(4) The cargo of potash was dry and free-running and dusty.

(5) The test previously referred to demonstrated that a shovel moved through the potash would release a charge to a metal stanchion which could not be repeated until the shovel was moved through the potash again.

(6) A static electrical charge is a natural phenomenon. It did not extend from the vessel to the petitioners. Rather it accumulated upon their persons and then was discharged to a ground (metallic part of the vessel) when touched by them. It is what one would experience in walking across a thick rug and then touching a switchplate or other ground. It is the popping one experiences upon sliding across the plastic seat cover of an automobile on a dry cool day and then touching the metal door handle. It occurs primarily in dry conditions. Walking across this potash cargo one could build up a static charge on his body, then receive a shock when he touched a

metal object allowing the charge to run off. Damp air (high humidity) allows such a charge to bleed off of a person because it is good conductor. Dry air (low humidity) is a good insulator and does not bleed off a charge building up on a person. A static electric discharge when it occurs is almost instantaneous, only a fraction of a second being required to allow the charge to leave one's body and go to ground.

(7) No practical way is known to so equip the hold of a ship with a bulk dry cargo that petitioners' experience could be avoided.

(8) In any event, according to petitioners, such an experience had never before been encountered in their 25 years on the waterfront in working cargoes such as this one.

(9) One petitioner visited a hospital emergency room and returned to the vessel. The others stayed on the job. All sought medical attention later and exhibited signs of apprehension and nervousness. All recovered.

## ARGUMENT

The issue presented here is a very narrow one, presents no new question of law, and does not involve any conflict with the previous rulings of this Court or of the Circuit Courts of Appeals. Basically petitioners' real complaint is that since they were shocked, they should be compensated for the same. The trial jury disagreed as did the District Court and Court of Appeals. The factual dispute being resolved against them by the jury, the matter should rest there.

I.

## THE DECISION BELOW IS CLEARLY CORRECT

Petitioners sought in the Trial Court to establish not only that they received a shock but also that such shock was brought about from stray charges in defective wiring on board the vessel. Respondent affirmatively sought to prove that the charge which brought on the shock was a static one upon their persons caused by weather conditions not controlled or preventable by anyone. The trial jury rejected petitioners' contentions about bad wiring and accepted the evidence that a static charge brought about their complaints.

The District Judge told the jury that petitioners had been shocked and that if bad wiring caused the same petitioners were to recover. But that if a static charge caused the shocks, theye were not entitled to recover.

The Circuit Court of Appeals affirmed, stating first that petitioners' only burden was to establish that they were shocked while working on the vessel. This, the Court said, was sufficient to establish a prima facie case of unseaworthiness upon which a verdict in petitioners' favor could be based. But the Court of Appeals also recognized respondent's right to refute this presumption of unseaworthiness with proof that the shocks were caused by a condition for which respondent was not liable. This it held respondent did by its proof explaining the source of the charge.

The Circuit Court of Appeals properly found that the vessel under the facts was seaworthy even though petitioners sustained a shock on board. It stated that

(Page 636) "The causative factor here was

the entry into the hold of relatively drier air with its insulating properties. The potential for harm arose not because electricity was generated but because the air would not bleed it off to ground. This was a natural condition of the natural atmosphere. The happening of the injurious discharge, when the men touched a willing conductor, was no more controllable by the ship than was a stroke of lightning, and just as unforeseeable."
382 F(2d) 633.

## 2.

## THERE IS NO CONFLICT OF DECISIONS AND NO FAILURE TO FOLLOW ESTABLISHED LEGAL PRINCIPLES IN THIS COURT

The sole complaint of petitioners is that the presence of static electricity made the vessel unseaworthy as a matter of law, "—since it was not originally intended to have its hold charged with electricity." (See Objection to Jury Charge, Petitioners' Appendix, Page 9a). This they say entitled them to a directed verdict below.

Petitioners object that the denial of such a directed verdict in their favor conflicts with *Mitchell* v. *Trawler RACER, Inc.* (1960) 362 U. S. 539 and with *Alaska SS Co., Inc.*, v. *Petterson* (1954) 347 U. S. 396. Their position is not sound. In both of those cases it was established that a part of the vessel itself was defective and caused injury to a workman on board. The *Mitchell* case established that a defect could impose liability even though only temporary in nature. The *Petterson* case stands for the rule that defective equipment may make a vessel owner liable even when the equipment was not furnished by such owner.

In the present case these principles were not rejected or ignored. As already stated the rule was followed below that the presence of electricity emanating from bad wiring in the vessel or from a source unexplained would cast liability upon respondent. This was stated without any reference to whether respondent was or was not negligent in bringing such condition about. Liability in such case was held to be absolute, regardless of fault. It then became a factual question whether the cause was bad wiring, an unexplained source, or static electricity not constituting a defective condition of the vessel. No directed verdict was proper for either side. Correct legal principles thus being applied to a disputed factual situation, the verdict against petitioners should not be disturbed.

But petitioners insist also that the present decision is at odds with that of the Circuit Court of Appeals for the Second Circuit as expressed in *Van Carpals* v. *The SS AMERICAN HARVESTER* (1961) 297 F(2d) 9. Again their position is unsound. In *Van Carpals,* steam and hot water came out of a valve and caused injury. No explanation was given by the vessel owner to show why this occurred. In this situation the Court of Appeals held the vessel unseaworthy and directed a verdict, saying that the conceded physical facts required a finding that the valve was defective and unfit for the purpose at hand.

But here a factual explanation was offered by respondent establishing what had caused the shocks thus offering an alternative which eliminated the vacuum existing in the *Van Carpals* proof and reflected the presence of a condition for which respondent was not legally liable. The fact finder here thus had a choice not available

in the *Van Carpals* case. For petitioner here did not simply recite that it did not know what caused the accident (as was the situation in *Van Carpals*), but affirmatively went forward with acceptable factual proof of what occurred.

Nor do the decisions below conflict with the principles set forth in *Morales* v. *CITY OF GALVESTON* (1962) 370 U. S. 165. There an unexpected and unforeseeable introduction of chemical fumes into a tank of a vessel caused injury to workmen there. This Court found the vessel seaworthy, the accident being an unexpected isolated occurrence. Here the proof established that the shocks were unexpected, not foreseeable or to be guarded against, and without precedent in the experience of the witnesses. This proof established without question that respondent was not negligent and that its vessel was reasonably fit, reasonably suitable for her intended service. *Mitchell* v. *Trawler RACER, Inc.* (1960) 362 U. S. 539.

3.

## THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The legal principles applicable to this case have already been established. What we have here is simply a disputed factual situation to which those established principles were applied. The choice by the fact finder of one set of those facts over the other is no basis for a review by this Court.

## CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN W. WINSTON
*Counsel for Respondent.*

January 5, 1968.

JOHN W. WINSTON
SEAWELL, McCOY, WINSTON & DALTON
*Counsel for Respondent*
936 Wainwright Building
Norfolk, Virginia 23510